Supreme Court, U.S.
FILED
MAR 8 1983
ALEXANDER L. STEVAS
CLERK

NO. 65, ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

• • •

STATE OF TEXAS,

Plaintiff

V.

STATE OF NEW MEXICO,

Defendant

UNITED STATES OF AMERICA,

Intervenor

TEXAS' REPLY TO THE EXCEPTIONS OF THE UNITED STATES AND NEW MEXICO

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STATE OF TEXAS, *Plaintiff*

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UNITED STATES OF AMERICA, *Intervenor*

TEXAS' REPLY TO THE EXCEPTIONS OF THE UNITED STATES AND NEW MEXICO

INTRODUCTION

Both the United States and New Mexico have excepted to the Master's recommendation that the United States' representative, or a third party, be vested with the power to participate and act in all Commission deliberations and to vote to resolve any impasse created by failure of the representatives of Texas and New Mexico to agree. The United States objected to the Master's conclusion that the continuation of the lawsuit is not within the judicial power of the Court. New Mexico objected to the Master's action in vacating Paragraph 4(b) of the Pre-Trial Order and to the Master's recommendation that the Court deny New Mexico's motion to dismiss. In her reply Texas will respond to the United States and New Mexico's objection to the Master's recommendation and to New Mexico's other objections and misrepresentation of questions presented and the statement of the case.

QUESTIONS PRESENTED

New Mexico continues to misrepresent this suit as one to review findings of fact made by the Commission. See New Mexico's Brief in Support of Exceptions, p. 1, No. 2. As Texas had said in her complaint and many times since filing the complaint, this is a suit to enforce the Pecos River Compact in which Texas is asking the Court to determine whether New Mexico has been making deliveries of water at the New Mexico-Texas state line in accordance with her Compact obligation. The Master agrees with Texas' view of the suit. Master's 1982 Report, p. 17.

New Mexico has been attempting since her brief in opposition to Texas' motion for leave to file her complaint to make this suit a review of agency findings or more specifically a review of the Engineer Advisory Committee's Review of Basic Data, RBD. As the Master has defined RBD in his Glossary, Appendix A, Master's 1982 Report, p. A-2, RBD is "a river routing study presented by engineers to the Commission and used by it in a limited fashion." The Master's explanation of RBD is based on his correct determination that RBD was only used by the Pecos River Commission for the determination of state line departures for the 1950-1961 period and not for future periods. Master's 1982 Report pp. 20-21; Master's 1979 Report, pp. 40-41, affirmed 446 U.S. 540. Therefore, the question presented is *not* whether the Court should review findings of fact but whether New Mexico has breached her Compact obligation and whether the continuation of the lawsuit is within the judicial function.

STATEMENT OF THE CASE

In her statement of the case, New Mexico is attempting, once again, to rewrite the history of compact administration and of this litigation. For a more accurate

and more objective discussion of the history of compact administration see Brief of the State of Texas in Response to New Mexico's Brief in Support of Affirmative Defenses, pp. 11-22, dated September 2, 1976, and the Master's 1979 Report, pp. 26-30. For a more accurate and more objective discussion of the history of the litigation see Master's 1982 Report, pp. 7-12.

An example of New Mexico's distortion of the administrative history is her statement at p. 3, "Commission efforts to administer the apportionment of water . . . were stymied at the outset because of mistakes, omissions and inconsistencies in the 1947 routing study and the accompanying inflow-outflow manual . . ." New Mexico cites Commission Minutes for Dec. 9-10, 1949, Stip. Ex. 4(b) at 7-8. However, the minutes of the Dec. 9-10, 1949, meeting shows that the Commission adopted a proposed program which included the following:

> 2. Proceed with inflow-outflow determinations in accordance with Article VI of the Compact and in conformity with the inflow-outflow manual. Inflow-outflow computations shall be made for the river sections listed in the inflow-outflow manual (p. 151 of the Senate Document 109) for three year periods commencing with the period 1947-1949.
>
> 3. Determine more accurately the "1947 Condition" as defined in the Compact:
>
> > (a) Obtain aerial photos of river bottom lands. (The committee should consider obtaining photos of all the irrigated lands below Alamogordo Reservoir).
> >
> > (b) Delineation of areas involving nonbeneficial consumption of water.

(c) The assembly and analysis of all pertinent hydrologic data available.

* * *

6. Study and investigate the items recommended in the inflow-outflow manual directed toward a more accurate determination of inflow-outflow relationships. (See last paragraph p. 150 Senate Document 109.)

Stip. Ex. 4(b), vol. 1, pp. 7-8. Contrary to New Mexico's assertions, the Commission planned to utilize the inflow-outflow manual in S.D. 109 for administration purposes and planned to augment it as directed by the manual.

Controversy in the Engineering Advisory Committee is what stymied Commission action. See Stip. Ex. 2, Minutes of EAC, April 2-3, 1957, pp. 96-110. New Mexico engineering advisor, Steve Reynolds, objected to the Inflow-Outflow Subcommittee's computations for the period 1947-1955. *Id.*, pp. 101-106. Continuing disagreement in the Engineering Advisory Committee and its failure to recommend annual accountings precipitated this lawsuit.

A complete sentence by sentence reply could be continued by Texas. However, such a review and response are not necessary because the Commission history is not essential for the Court's consideration of the Master's recommendation. Rather, New Mexico's presentation of her version of the compact administration was given to confuse and in an attempt to redefine the issues and scope of the lawsuit. Rather than dignifying New Mexico's mischaracterizations by responding to them, Texas has attached as Appendix A portions of a statement by R.B. McGowen, Jr., given to the Pecos River Commission on February 21, 1974, which will give the Court another version of the administrative history. Mr. McGowen's entire statement is found at Stip. Ex. 4(b), vol. 2, pp. 468-473.

New Mexico's version of the history of the present litigation, New Mexico's Brief in Support of Exceptions, pp. 8-13, is another attempt by New Mexico to raise RBD as the controlling issue in this lawsuit. As Texas has stated above and the Master has stated in his report, this suit is not a review of agency findings. The Master's statement of the history of the litigation, Master's 1982 Report, pp. 7-12, with Texas' explanation for the introduction of the double mass analysis method, Texas' Brief in Support of Exceptions, p. 2, is an accurate and objective discussion of the history. Texas relies upon the Master's statement of the history with Texas' modification and rejects completely New Mexico's statement of the history. Texas agrees with the Master's decision to vacate the ¶4(b) portion of the 1977 Pre-Trial Orders and his reasons therefor.

One matter that needs further explanation is Texas' position at the March 8-16, 1982, hearing. Texas presented evidence on the double mass analysis method to support her Motion to use the Double Mass Inflow-Outflow Method to Account for Stream Flows in the Determination of the 1947 Condition Base Relationship. In her presentation, Texas complied with the Master's Dec. 19, 1981, order and set out the basic facts, unmeasured values, and techniques that would be used in the double mass method.

Texas then gave in the alternative the basic facts, unmeasured values, and techniques that she would use if a river routing method was used to determine the 1947 condition base relationship and for accounting during the administration of the compact. Contrary to New Mexico's assertions, Texas was not attempting to present objections to RBD. Texas was presenting a river routing method in case the double mass was not accepted by the Master. New Mexico agreed to a substantial portion of the Texas proposed river routing but disagreed with any basic fact, unmeasured value, or

technique that varied from what was used in RBD. New Mexico Exhibit 54, pp. 8-14 and Tr. vol. XLII, pp. 4194-4243.

New Mexico's unrelenting embrace of RBD is the one obstacle to the parties agreeing to any method of accounting. This is demonstrated by New Mexico's engineering witness' testimony at the March 8-16 hearing. Tr. vol. XLII, pp. 4191 and 4231-4235. When asked how New Mexico's statement on basic facts, unmeasured values, and techniques varied from RBD, the witness replied that it only varied in three areas and the variances were the result of the decisions of the Special Master. *Id.*, p. 4191. During cross examination on a computational technique in the river routing method by a Texas attorney, New Mexico's witness admitted that a procedure proposed by Texas did not make any difference in the routing study. *Id.*, p. 4231. However, when asked if New Mexico would agree to the Texas proposed procedure, the witness refused to agree to the procedure because it was not the procedure used in RBD. *Id.*, pp. 4234-4235.

THE COURT MAY VEST THE UNITED STATES REPRESENTATIVE WITH THE POWER TO VOTE TO RESOLVE ANY IMPASSE OR, IN THE ALTERNATIVE, MAY APPOINT A PANEL TO AID THE COURT WITH TECHNICAL DECISIONS.

The Master has concluded that the equity power of the Court permits a judicial soluti n of any impasse caused by the one state veto provision of the compact. Master's 1982 Report, pp. 25-26. Accordingly, the Master has recommended that the Court vest the United States representative, or a third party, with the power "to participate and act in all Commission deliberations and to vote to resolve any impasse created by failure of the representative of Texas and New Mex-

ico to agree." Master's 1982 Report, pp. 2-3. Texas accepts the Master's recommendation. New Mexico and the United States have objected to the recommendation.

Texas adopts the Master's reasons for his conclusion that the Court has the equity power to resolve the impasse that results from the Compact provision that only the state representatives have a vote in Commission deliberations. Art. V(a). The equity power can be used to carry out the primary purpose of the Compact, i.e., to provide for the equitable division and apportionment of the use of the waters of the Pecos River. Art. I. Another purpose of the Compact is "to remove causes of present and future controversies." Art. I. The one state veto has frustrated this purpose; therefore, vesting the United States representative or a third party with the power to vote in Commission deliberations would carry out the stated purposes. The negotiators intended the Commission to aid compact administration, not hinder it. The Master's recommendation would fulfill that intention.

In response to New Mexico and the United States' argument that the Master's recommendation is rewriting the Compact, Texas submits that the Master's recommendation is no more rewriting the Compact than his definition of the 1947 condition. The Compact specifically defines the 1947 condition as "that situation in the Pecos River Basin as described and defined in the Report of the Engineering Advisory Committee." Art. II(g). However, the Master defined the 1947 condition in other terms to carry out the intent and purpose of the Compact and the Court affirmed his definition. If the Court has the power to rewrite the definition of the 1947 condition, it has the power to provide a means of resolving an impasse created by the voting provisions of the Compact. The Court's exercise of its equity power will signal other compact agencies that have no means of resolving an impasse that the intent of compacts will not be frustrated by procedural devices.

Texas submits that the Court has a choice. It may exercise its equity power as the Master recommends or it may decide to enforce the Compact by quantifying the 1947 condition as Texas has alternatively argued, Texas' Brief in Support of Exceptions, pp. 4-15, and as the United States has argued, Supporting Memorandum to the Exceptions of the United States, pp. 8-17. If the Court does not accept the Master's recommendation, the Court may decide to resolve the technical issues by appointing a panel of experts as was done in *Oklahoma v. Texas*, 260 U.S. 606 (1923). In that case, the Court was resolving a controversy over that part of the boundary between the states of Texas and Oklahoma which follows the Red River. In order to resolve the controversy, the Court had to interpret the provisions of the Treaty of 1819 between the United States and Spain. After the Court had interpreted the treaty and defined what the boundary was intended to be, the Court applied the legal definitions to the physical situation by the following procedure:

> The matter of running, locating, and marking the boundary upon the ground in accordance with the principles stated herein will be referred to three commissioners to be appointed by the court, their action to be subject to its approval.

Id. at 640.

Texas submits that the Court may use a similar procedure in this suit to translate the definition of the 1947 condition into water quantities so that there is a numerical standard against which compliance can be measured. The Court could use the existing Pecos River Commission for this purpose if the United States representative, or a third party, is given a vote in deliberations or could appoint an entirely new panel. This procedure will relieve the Master of the difficult decisions with which he is faced. Master's 1982

Report, pp. 12-15 and 21. Texas believes that if this procedure is used, the Pecos River Commission with a voting United States representative would be the most expedient panel because of its familiarity with the problems and procedures. If a completely new panel is preferred, Texas requests that the states be permitted to suggest members.

IF THE COURT DOES NOT ACCEPT THE MASTER'S RECOMMENDATIONS, THE CONTINUATION OF THE LAWSUIT IS WITHIN THE JUDICIAL FUNCTION

Texas has already argued as an alternative exception to the Master's report that the continuation of the lawsuit is clearly within the judicial power of the Court. See Texas' Brief in Support of Exceptions. The United States has made a similar argument and Texas completely agrees with and supports the United States' argument. See United States' Supporting Memorandum, pp. 8-17. New Mexico, on the other hand, argues that the Court has only the power to review Commission findings. See New Mexico's Brief in Support of Exceptions, pp. 26-36. Texas disagrees with the New Mexico position for the reasons stated in Texas' brief and the United States' brief.

New Mexico's position is based upon her mistaken belief that RBD has been adopted by the Commission for all purposes. The Master has found that RBD was only accepted and adopted for the determination of state line departures for the 1950-1961 period and not for future periods. Master's 1979 Report, pp. 40-41, affirmed 446 U.S. 540. In affirming the Master's 1979 Report the Court said, ". . . the Report is in all respects confirmed. . ." *Id.* at 540.

The only relevance that RBD has in this lawsuit is that it was used by the Commission to make the determination of state line departures during the period

1950-1961. The findings of the Commission for the state line departures during the period 1950-1961 are prima facie evidence of the facts found. Art. V(f). If Texas shows RBD to be incorrect, then she has rebutted the findings of the Commission for the period 1950-1961. This is the only part RBD plays in this lawsuit. New Mexico's continued attempts to focus attention and to place importance upon RBD in the face of the Master's rejection of her arguments is an attempt to obfuscate the real issues of this lawsuit. New Mexico is attempting to redefine the issues and the scope of the lawsuit.

New Mexico says the Master is confused. New Mexico's Brief in Support of Exceptions, p. 27. Texas contends that the Master is correct and that New Mexico is confused because she will not accept his finding regarding RBD and this Court's approval of his finding. As the Master has stated, Master's 1982 Report, p. 17, and as Texas continues to submit, this is not a suit to review Commission action. This is a suit to interpret and enforce the Compact. Texas strongly believes, and the United States agrees, that it is within the judicial power of this Court to interpret the Compact and to determine whether New Mexico has complied with the Compact requirements when the Commission has failed to act. For the above-stated reasons, New Mexico's motion to dismiss should be denied.

At the close of New Mexico's brief in support of her exceptions, New Mexico makes the gratuitous offer that if the Court grants her motion to dismiss and returns the matter to the Commission, she will recommend that a mutually agreeable mediator be employed "to assist the Commission in resuming its function." New Mexico's Brief, p. 36. New Mexico is apparently suggesting that a non-binding arbitrator be employed. A non-binding arbitrator will not give Texas an adequate remedy. It seems that New Mexico is suggesting a solution similar to that recommended by the Master but

without being bound by any action of the mediator. Such procedure would aid New Mexico because prolonging the resolution of this controversy is to the advantage of New Mexico. Master's 1982 Report, p. 15. Also, the Master correctly stated that dismissal of the suit would leave Texas without a remedy. *Id.* Until New Mexico indicates a willingness to compromise, mutual agreement between the states is doubtful. Texas is ready to discuss settling the controversy with New Mexico at any time. However, this case should not be delayed any further or dismissed on the basis of a non-binding mediation.

CONCLUSION

The Court has a choice to accept the Master's recommendations or to translate the definition 1947 condition into water quantities and determine compliance with the Compact. It is within the Court's equity power to do the former and clearly within its judicial power to do the latter. This is a suit to enforce the Pecos River Compact, not to review Commission findings. Texas prays that this suit be continued and that New Mexico's motion to dismiss be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, R. Lambeth Townsend, attorney for the State of Texas, plaintiff herein, and a member of the bar of the United States Supreme Court, certify that on this the _____ day of _____, 1982, I served copies of the foregoing by U.S. mail, postage prepaid, to counsel for New Mexico and the United States.

R. Lambeth Townsend
Assistant Attorney General

APPENDIX A

Excerpts from the statement of R.B. McGowen, Jr., Pecos River Commissioner for Texas to the Annual Meeting of the Pecos River Commissioner on February 21, 1974.

. . .

The Compact provided that the apportionment of the Pecos River water should be on the basis of the 1947 Condition of the Pecos River. The Report of the Engineering Advisory Committee, as adopted, contained the basic data which attempted to define the 1947 Condition.

On December 10, 1949, the Commission adopted a program of action for the Pecos River Commission. The program required proceeding with inflow-outflow computations as required by the Compact for the apportionment of water for the years 1947-1949. The program also called for a "more accurate determination of the '1947 Condition' as defined in the compact ..." *Minutes, Second Meeting, Pecos River Commission,* December 9, 10, 1949.

On January 18, 1951, the Commission adopted a report of the Engineering Advisory Committee which included "inflow-outflow computations" for the three-year period "1947 through 1949." The same report noted that:

> ". . . the inflow-outflow relationship for the three-year period 1946-1948 for the reach of the river from Alamogordo Dam to the New Mexico-Texas state line shown on Plate No. 2, page 154, Senate Document 109, falls below the limit of the relationship as defined by previously existing data. As more data becomes available in the future, this point may be

important to define more accurately the lower limit of the relationship as shown on the Plate." *Minutes, Sixth (Second Annual) Meeting, Pecos River Commission,* January 18, 1951.

On June 27, 1952, the Commission adopted a recommendation of the Engineering Advisory Committee which called for a "review of the inflow-outflow studies and computations heretofore made . . . ." *Minutes, Ninth Meeting, Pecos River Commission,* June 27, 1952. This recommendation apparently refers to the computations adopted at the Second Annual Meeting of the Commission on January 18, 1951.

On February 15, 1954, the Commission adopted a report of the Engineering Advisory Committee which called for a complete review of the historical inflow-outflow relationship reflected in the Report of the Engineering Advisory Committee adopted at the time the Compact was ratified. The recommendation for review was stated as follows:

> "After some discussion of the problem (computing inflow-outflow relationships) by the Committee it became apparent that the entire matter of inflow-outflow relationships should be reviewed by the subcommittee (on inflow-outflow relationships). Several years of stream flow records are now available to the Committee which were not available at the time the inflow-outflow manual was prepared. Also, more knowledge is available with respect to salt cedar coverage in the key year 1947. The subcommittee, therefore, was instructed to determine as accurately as possible the inflow-outflow relationships under the 1947 Condition and report back to the Engineering Advisory Committee at the earliest possible date in order that it may make recommendations to the Commission." *Minutes, Thirteenth (Fifth Annual) Meeting, Pecos River, Commission,* January 21, 1954, recessed to February 15, 1954.

On July 30, 1957, the Commission adopted a recommendation of the Engineering Advisory Committee that:

> "A special subcommittee be created to restudy under 1947 Conditions the inflow-outflow relationships for the reach of the River from Alamogordo Dam to the New Mexico-Texas state line. The purpose of the restudy is to determine whether the relationship depicted by the curves appearing in pages 153 and 154 of Senate Document 109, 81st Congress, 1st Session, should be modified."

The Commission also adopted a recommendation calling for a review by the subcommittee of the Inflow-Outflow Manual (adopted by the Commission at the time the Compact was signed). At the same meeting, the Commission, by official action, accepted an opinion of the Legal Committee which stated that the Commission had authority to correct any mistakes in inflow-outflow computations and criteria.

> "The Committee observed, however, that the inflow-outflow curves, graphs and plates in Senate Document 109, 81st Congress, 1st Session, are more or less sacred, and suggested that the Commission should be slow to make any changes in the curves, graphs, and plates, and then only after careful consideration with clear and convincing evidence to support the changes." *Minutes, Twenty-Second (Eighth Annual) Meeting, Pecos River Commission,* January 17, 1957, recessed to July 29, 1957.

On January 31, 1961, the Commission adopted the Review of Basic Data and all appendices as "findings of fact of the Commission." *Minutes of the Twenty-Seventh (Twelfth Annual) Meeting, Pecos, River Commission,* January 19, 1961, recessed to January 31, 1961.

On November 9, 1962, the Commission adopted as "findings of fact" a report of the Engineering Advisory Committee which specifically spelled out the "departure of the 1947 Condition, State Line Outflow, period 1950 through 1961.' The departures included in the report were computed by using the analyses contained in the Review of Basic Data adopted by the Commission on January 31, 1961, and showed an accumulated departure of 53,300 acre-feet. The Report of the Engineering Advisory Committee spelling out the "departure of the 1947 Condition" also showed accumulated departures of 48,000 acre-feet from 1955 through 1961 resulting from the training dike at McMillan Reservoir and stated that "these departures are not chargeable (as a depletion) as a result of man's activities." *Minutes, Twenty-Eighth (Thirteenth Annual) Meeting, Pecos River Commission,* January 18, 1962, recessed to November 9, 1962.

On July 1, 1970, the Texas members of the Engineering Advisory Committee, assisted by the Texas Water Rights Commission, completed a full accounting report of the Pecos River water. The computations were performed in accordance with the basic data included in Senate Document 109. The report showed an accumulative departure from the 1947 Condition of 1,213,600 acre-feet and concluded that "about 1,100,000 acre-feet of the total departure of state-line flow from 1947 Conditions is chargeable to New Mexico as being man-made depletions." *Accounting Pecos River Waters, 1950-1969 Under The Pecos River Compact,* Technical Services Division, Texas Water Rights Commission, July 1, 1970.

On January 28, 1971, the Texas Engineer Advisors and the New Mexico Engineer Advisors submitted separate reports to the Pecos River Compact Commission. The Texas report described the computation methods and data used in the July 1, 1970, accounting report as being in conformity with the basic data and methods described in Senate Document 109. The Texas

report contended that the methods and data described were the only ones which could be used under the Compact.

The use of the basic data and computation methods contained in Senate Document 109 results in an allocation to Texas of approximately 39,000 acre-feet of water per year more than is allocated by using the data and computation methods contained in the Review of Basic Data. (Letter to R.B. McGowen, Jr., Pecos River Commissioner, from James A. Luscombe, Sr., Texas Interstate Compacts Coordinator, dated June 10, 1969).

. . .

See Stip. Ex. 4(b), vol. 2, pp 468-473 for entire statement.